

Honorable Jamal N. Whitehead

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

VALVE CORPORATION,

Plaintiff,

v.

LEIGH ROTHSCHILD, ROTHSCHILD

BROADCAST DISTRIBUTION

SYSTEMS, LLC, DISPLAY

TECHNOLOGIES, LLC, PATENT ASSET

MANAGEMENT, LLC, MEYLER LEGAL

PLLC, AND SAMUEL MEYLER

Defendants.

)
) **DECLARATION OF DONALD MCPHAIL**
) **IN SUPPORT OF MOTION TO**
) **WITHDRAW**
)

) Complaint filed: July 7, 2023

) Case No.: 2:23-cv-01016
)

I, Donald McPhail, declare as follows:

1. I am attorney with Merchant & Gould P.C. (hereinafter “Merchant & Gould” or “the Firm”), and I am one of the attorneys of record for Defendants Leigh Rothschild; Rothschild Broadcast Distribution Systems, LLC; Display Technologies, LLC; Patent Asset Management, LLC; Meyler Legal PLLC; and Samuel Meyler (collectively, the “Defendants”).

2. I make this declaration on my own information, knowledge, and belief, based on a reasonable investigation, in support of the reply brief filed in support of the Motion to Withdraw filed contemporaneously herewith on behalf Eric R. Chad and myself (collectively

1 “Counsel”) and to address the Declaration of Leigh Rothschild in Opposition of Counsel’s
2 Motion to Withdraw (Dkt. 92), and the statements Mr. Rothschild made therein.

3 3. I previously filed a Declaration in support of Counsel’s Motion to Withdraw
4 (Dkt. 82).

5 4. Paragraph 2 of the Rothschild Declaration states “Merchant & Gould assured
6 me that payment of their legal fees would be deferred and contingent” Neither I nor the
7 Firm agreed to represent the Defendants on an indefinitely deferred or contingent basis.

8 5. My representation of Defendants in this matter began while I worked at my
9 previously employer, the law firm of Oblon, McClelland, Maier & Neustadt (“Oblon”). While
10 working at Oblon, I had represented entities associated with Mr. Rothschild in litigation in
11 which Mr. Rothschild’s entity was Plaintiff and where the relief sought was the award of
12 damages. As a result, some of these matters were on a contingent basis. The present lawsuit
13 adverse to Valve Corporation involved defense representation. Accordingly, I expressly told at
14 least Mr. Rothschild and Mr. Falcucci (Chief Operating Officer of Defendant Patent Asset
15 Management, LLC) in writing that I could not and would not handle this case on a contingent
16 basis because it was a defense. While representing Defendants at Oblon the understanding was
17 that the Rothschild Defendants would pay Oblon for the time spent on this matter at Oblon’s
18 hourly rates.

19 6. In 2023, Defendants submitted a claim for coverage of the expenses associated
20 with this litigation to the insurer of PAM, Hiscox Insurance Company (the “Insurer”). I
21 expressly conveyed to at least Mr. Falcucci that Mr. Rothschild and/or PAM were responsible
22 for any invoices unless and until any payments were made to PAM by its Insurer.

23 7. I joined the Firm in or around April 2024. In the course of updating engagement
24 agreements with clients to align with the policies of the Firm, I provided a proposed
25 engagement agreement to Defendants in the form of the Firm’s standard engagement
26 agreement sometime before September 26, 2024. That agreement provided for monthly billing
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1 of attorneys' fees and costs and prompt payment of all invoices for said fees and costs. It also
2 provided that, if invoices remained unpaid for more than 90 days, Counsel and the Firm could
3 withdraw and that Defendants would not oppose withdrawal.

4 8. On September 27, 2024, I received an email from Daniel Falcucci, Chief
5 Operating Officer of PAM. In that email, Mr. Falcucci requested an editable version of the
6 engagement agreement to suggest amendments thereto and informed me that PAM had
7 experienced what it believed to be positive developments with its Insurer.

8 9. Sometime between my initial engagement in connection with this litigation and
9 September 27, 2024, I learned that PAM's Insurer had rejected coverage of PAM's claim.
10 Based on representations by Mr. Falcucci and Mr. Rothschild, I understood this would be a
11 temporary situation (*i.e.*, a couple of months). Defendants represented that the coverage issue
12 was likely to be resolved favorably (to Defendants) without resort to litigation.

13 10. In September of 2024, Defendants requested a temporary deferral of payment of
14 fees (not costs) while Defendants negotiated coverage with Defendant Patent Asset
15 Management, LLC's ("PAM") insurance company.

16 11. In oral conversations with Mr. Falcucci and Mr. Rothschild around September
17 2024, in view of my understanding of the ongoing discussions between PAM and its Insurer
18 (which I understood to be positive) and my longstanding relationship with Mr. Rothschild, I
19 indicated that some flexibility could be provided to Defendants regarding the timing of
20 payment of incurred attorneys' fees. At that time, my understanding was that the insurance
21 coverage discussions were moving in a positive direction for Defendants and that the coverage
22 issue would be resolved within a few months. My offer of flexibility was not intended to be,
23 and I do not believe it could have been in good faith interpreted as, an offer to defer all
24 payments for attorneys' fees indefinitely until resolution of PAM's claim with its Insurer or to
25 not receive payment at all in the event of denial by the Insurer.

26 12. On October 10, 2024, Defendants proposed revisions to the Merchant & Gould
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1 engagement letter after these conversations. These proposed revisions, which essentially
2 requested representation on a contingent basis, did not reflect the September 2024 discussions.
3 Neither I nor the Firm ever accepted or agreed to these proposed amendments. Defendants'
4 revisions, however, stated the parties would revisit the fee arrangement if litigation against the
5 Insurer became necessary. Defendants' proposed revisions did not alter the provision
6 providing for withdrawal, without Defendants' opposition, if invoices went unpaid for more
7 than 90 days.

8 13. The parties have always agreed that Defendants would pay costs. Indeed, Mr.
9 Falcucci's October 10 edits confirmed that Defendants would pay out-of-pocket expenses
10 incurred by the Firm in connection with this litigation. To date, however, Defendants have not
11 reimbursed the Firm for any costs the Firm has incurred.

12 14. I became aware that litigation against the insurer was necessary in late 2024 or
13 early 2025. Counsel requested payment of fees and costs shortly thereafter. Defendants filed a
14 lawsuit relating to coverage on May 5, 2025. A true and correct copy of the complaint filed by
15 PAM is attached hereto as Exhibit 1. With the coverage dispute between PAM and its Insurer
16 no longer moving in a positive direction and the coverage denial finalized, the Firm continued
17 requesting payment of previously incurred attorneys' fees. Requiring the Firm to represent
18 Defendants until resolution of this coverage litigation, which could last for years and which
19 could result in confirmation of the denial of coverage, will impose a serious financial burden
20 on the Firm.

21 15. In an attempt to provide some flexibility to Defendants without putting the Firm
22 in a financially untenable situation, on May 1, 2025, the Firm offered to continue its
23 representation of Defendants in this litigation if Defendants committed to merely pay
24 attorneys' fees and costs incurred going forward with the Firm reserving the right to seek
25 payment of previously incurred fees at a future date. Defendants indicated they would not
26 agree to such an arrangement, prompting the Firm to file the pending motion to withdraw.

1 Defendants have never paid any of the Firm's invoices and have never paid costs, and
2 Defendants refuse to pay such fees and costs.

3 16. I do not agree that the Firm's withdrawal will result in prejudice to Defendants.
4 The Firm has continued to participate in this litigation in the interim period while the Firm's
5 motion is pending. And the Firm will work to get Defendants' new counsel, once retained, up
6 to speed on the litigation. Defendants regularly engage in litigation and have relationships with
7 numerous law firms who often handle complex intellectual property litigation on behalf of
8 Defendants.

9 17. Upon information and belief, certain representations of Mr. Rothschild in his
10 signed declaration and the facts herein justify withdrawal per 1.16.

11 18. To avoid prejudice to any Party, I would thus request an immediate stay of this
12 litigation at least until the present Motion to Withdraw is decided to prevent the Firm from
13 proceeding to represent Defendants with this apparent conflict ongoing.

14 19. The Firm has documentation, including correspondence with Mr. Falcucci and
15 Mr. Rothschild, supporting the statements made in this declaration. Out of an abundance of
16 caution, the Firm and I have not attached that documentation to this Declaration. It is our
17 belief that this information, which is not relevant to the underlying litigation, would be most
18 appropriate for review by the Court in camera or at in an *ex parte*, in camera hearing or
19 conference with the Court. Should the Court believe that review of these documents in camera
20 would be helpful, the Firm remains willing to provide those documents to the Court.

21 20. Attached hereto as Exhibit 2 is a true and correct copy of a May 7, 2025 email
22 from Kate Geyer to Defense Counsel.

23 21. Attached hereto as Exhibit 3 is a true and correct copy of Plaintiff Valve
24 Corporation's Initial Disclosures.

25 22. Attached hereto as Exhibit 4 is a true and correct copy of excerpts of Plaintiff
26 Valve Corporation's Responses and Objections to Defendants' First Set of Interrogatories.

1 23. Attached hereto as Exhibit 5 is a true and correct copy of an email chain
2 between counsel for the Parties' with the most recent email from Dario Machleidt to Eric Chad
3 and dated May 28, 2025.

4 24. Attached hereto as Exhibit 6 is a true and correct copy of the Original Complaint
5 for Patent Infringement in the case of *Barrier Guard Technologies, LLC v. Apex Fabrication*
6 *& Design, Inc.*, No. 5:25-cv-01368-CH (E.D. Pa.) (Dkt. 1, filed Mar. 14, 2025).
7

8 I declare under the penalty of perjury under the laws of the United States of America
9 that the foregoing is true and correct to the best of my knowledge.
10

11 Executed on: June 2, 2025

By: /s/ Donald R. McPhail
Donald R. McPhail